UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/530
23 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 530

Case No. 565: SALINAS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Arnold Kean;

Whereas at the request of Carlos Salinas, a former staff member of the Economic Commission for Latin America and the Caribbean, hereinafter called ECLAC, the Tribunal extended to 31 December 1990 the time-limit for the filing of an application to the Tribunal;

Whereas, on 18 October 1990, the Applicant filed an application containing the following pleas:

"II. PLEAS

The Tribunal is respectfully requested to:

1. Rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board contained in its report No. 610 of 5 November 1987, paragraph [44], namely,

'that the appellant should be reinstated in his post or in a post of similar grade.'

or, in other words, the Secretary-General's decision to terminate the Applicant's permanent appointment;

2. Decide that the Secretary-General's decision to terminate Applicant's permanent appointment, in spite of the unanimous Joint Appeals Board recommendation, contradicts the assurances that the Secretary-General

would accept all unanimous reports of the Board provided they do not impinge on major questions of law or principals;

The Internal Rules of Procedure of the Joint Appeals Board at Headquarters, adopted on 11 January 1989 (...), use the same wording in paragraph 16 and add:

'if he (the Secretary-General) decides not to accept the report of the Board, he sets out the reasons for its rejection in a letter to the Appellant.'

3. Order the implementation of the Joint Appeals Board's unanimous recommendation contained in paragraph 44 of its report and consequently, the immediate reinstatement of the Applicant as of 5 November 1987, especially since Applicant has been unemployed for almost four years.

4. Alternatively, in lieu of specific performance, order the Secretary-General to pay instead the Applicant, as compensation, the sum equivalent to three years net base salary."

Whereas the Respondent filed his answer on 16 April 1991;

Whereas the Applicant filed written observations on 31 July 1991;

Whereas the facts in the case are as follows:

The Applicant, who had entered the service of ECLAC on 18 April 1963, received a permanent appointment on 1 March 1974 as a Mimeograph Operator at the G-3 level in the Documents Reproduction Section.

In 1983 and 1984 the Applicant met with serious financial difficulties and requested salary advances from the Organization. On 16 October 1984, in a memorandum addressed to the Director of the Division of Administration of ECLAC, he expressed his agreement to a termination of his permanent appointment under the last paragraph of staff regulation 9.1(a) and stated that he would not contest the decision of the Secretary-General should the latter decide to terminate the appointment under that paragraph. On 2 January 1985 the Office of Personnel Services at

Headquarters cabled the Chief of the Personnel Section of ECLAC that it could no longer support the agreed termination of the Applicant "for indebtedness". On 8 January 1985 the Director of the Division of Administration of ECLAC informed the Applicant that the Secretary-General had decided not to accept his request for an agreed termination of his appointment.

On 26 March 1985, however, the Chief of the Personnel Section of ECLAC informed the Assistant Secretary-General for Personnel Services that the Executive Secretary of ECLAC as well as the Division of Administration wished to terminate the Applicant's contract in accordance with the last paragraph of staff regulation 9.1(a), and he requested the Assistant Secretary-General's approval for such action. The Chief of the Personnel Section of ECLAC reiterated his request on 28 June 1985. It appears that in October 1985, in the presence of a Senior Personnel Assistant, the Applicant verbally requested the Chief of the Personnel Section of ECLAC to follow up on his agreed termination since it was imperative that he receive the termination indemnities involved as soon as possible. On 12 December 1985, in a memorandum addressed to the Secretary-General through the Under-Secretary-General for Administration and Management and the Legal Counsel, the Assistant Secretary-General for Personnel Services recommended the Applicant's termination under the last paragraph of staff regulation 9.1(a). On 27 December 1985 the Under-Secretary-General for Administration and Management approved the recommendation on behalf of the Secretary-general. The decision was conveyed to the Applicant by cable and by the following letter dated 2 January 1986 from the Personnel Officer for ECLAC at Headquarters:

> "This is to inform you that the Secretary-General, noting that you have indicated in writing that you would be agreeable to the termination of your permanent appointment, had decided to terminate your permanent appointment in accordance with the last paragraph of staff regulation 9.1(a). The termination will take effect on 10 January 1986 COB [close of

business]. This letter constitutes formal motive of termination of your appointment.

You will receive three months' salary in lieu of notice under staff rule 109.3(c).

..."

On 7 January 1986 the Applicant sent the following cable to the Assistant Secretary-General for Personnel Services:

"RE YOUR CABLE 0181 REGARDING AGREED TERMINATION TO BE EFFECTIVE TEN JANUARY 1986. AAA IN OCTOBER 1984 UNDER EXTREME PRESSURE DUE TO ECONOMIC AND PERSONAL PROBLEMS EYE REQUESTED THAT MY APPOINTMENT BE TERMINATED AND EYE SIGNED A MEMORANDUM IN THAT RESPECT. BBB SINCE THEN AND DURING ALL OF 1985 EYE DID NOT RECEIVE ANY INFORMATION REGARDING MY REQUEST. WITH GREAT EFFORTS AND WITH THE HELP OF MY FELLOW STAFF MEMBERS EYE HAVE BEEN ABLE TO FACE AND RESOLVE THE SERIOUS PROBLEMS THAT EYE THEN HAD. AS A RESULT BY THE END OF 1985 EYE HAD SOLVED MY PROBLEMS AND UNDERSTOOD THAT MY REQUEST WAS NO LONGER VALID IN VIEW OF THE LACK OF RESPONSE. CCC MUCH TO MY SURPRISE EYE RECEIVED THE AFORE-MENTIONED CABLE AND THEREFORE IN VIEW OF THE NEW CIRCUMSTANCES EYE REQUEST THAT YOU RECONSIDER AND ANNUL MY REQUEST AND THE DECISION OF THE SECRETARY-GENERAL."

Having been separated from service on 10 January 1986, the Applicant, on 14 May 1986, sent a letter to the Secretary-General under staff rule 111.2(a), requesting reconsideration of his case and reinstatement in the service of ECLAC. On 9 July 1986 the Assistant Secretary-General for Personnel Services informed the Applicant that he could see no grounds for reconsidering the challenged decision and, on 24 September 1986, the Applicant lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board submitted its report on 5 November 1987. The Board's conclusions and recommendation read as follows:

"Conclusions and Recommendation

43. The Panel concludes that when it became clear, before the appellant's separation from the service,

that he was no longer in agreement with an agreed termination of his permanent appointment, the Administration should, in equity, have reviewed the circumstances of the case before proceeding to separate him.

44. Accordingly the Panel recommends that the appellant should be reinstated in his post or in a post of a similar grade."

Following the recommendation of the Joint Appeals Board, the Administration, in consultation with the Applicant, examined the possibility of reinstating him taking into consideration such factors as his medical condition and his ability to reimburse the payments made to him upon separation. On 9 June 1988, however, the Under-Secretary-General for Administration and Management informed the Applicant that:

"...

The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the original decision to terminate your appointment, effective 10 January 1986, under the last paragraph of staff regulation 9.1(a). As noted by the Board in paragraphs 5 and 8 of its report, you had expressed your written agreement to such termination on 16 October 1984 and as late as October 1985 and you did not withdraw your consent prior to notification of that action. In this connection I should like to advise you that the Secretary-General is under no legal obligation to reinstate you following the termination of your appointment under staff regulation 9.1(a). After consultations with yourself, your designated counsel, and ECLAC, it has, moreover, emerged that the implementation of the Board's recommendation would not be feasible for reasons of practicality.

However, in view of the Secretary-General's policy of accepting unanimous Board recommendations wherever possible, and taking into account the entire circumstances of your case, he has decided to grant you six months net base salary at G-3, Step XI, at the rate in effect upon the termination of your appointment under the last paragraph of staff

regulation 9.1(a), in final settlement of your case, and to take no further action on the matter.

..."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Secretary-General's explanation for rejecting the Joint Appeals Board report is misleading.

2. The Secretary-General cannot introduce before the Tribunal issues which were not submitted to the Joint Appeals Board.

3. The Secretary-General committed himself to implement unanimous recommendations of the Joint Appeals Board.

Whereas the Respondent's principal contentions are:

1. Acceptance by the Secretary-General of the Applicant's request for an agreed termination created a contract binding on the parties, at the latest upon communication of that acceptance to the Applicant.

2. The Secretary-General is not bound to accept unanimous recommendations of a Joint Appeals Board Panel.

The Tribunal, having deliberated from 17 to 23 October 1991, now pronounces the following judgement:

I. The Applicant challenges the decision of the Respondent to terminate his permanent appointment under the last paragraph of staff regulation 9.1(a). He claims that although there was originally a written proposal on his part for an agreed termination, this proposal was no longer in effect when he was finally terminated. The Respondent claims that the Applicant having proposed in writing an agreed termination and having undertaken not to contest a decision to that effect, the

Respondent's decision is in full accord with the last paragraph of staff regulation 9.1(a).

II. The Tribunal notes the conclusion of the Joint Appeals Board that since the Applicant was no longer in agreement with an agreed termination of his permanent appointment, the Administration should, in equity, have reviewed the circumstances of the case before proceeding to separate him. The Board recommended that the Applicant should be reinstated in his post or in a post of a similar grade.

III. The rule applicable in this case is the last paragraph of staff regulation 9.1(a) which provides that:

> "Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned."

IV. The Tribunal observes that the provision quoted above has vested the Secretary-General with a discretionary power to terminate under certain conditions the appointment of a staff member who holds a permanent appointment. It has prescribed the conditions of validity of such a decision. Three conditions must be fulfilled:

(a) The decision would be in the interest of the good administration of the Organization;

(b) It would be in accordance with the standards of the Charter;

(c) It is not contested by the staff member concerned.

V. Although the text of the provision suggests that the Secretary-General takes the initiative in the process of such a termination, the Tribunal observes that, in this particular case, it was the staff member who took the initiative. In his

memorandum of 16 October 1984 addressed to the Director of the Division of Administration, the Applicant proposed a termination of his permanent appointment under the last paragraph of staff regulation 9.1(a). The Applicant stated that he would not contest the decision of the Secretary-General to terminate his permanent appointment should the latter take such a decision under the last paragraph of staff regulation 9.1(a). The Applicant was prompted to make such a proposal by a specific reason of his own, namely, the pressure of his financial problems.

VI. The Applicant expected at the time that the Secretary-General would be in a position to accept his proposal for an agreed termination.

VII. The Tribunal notes that the reaction of the Secretary-General to the Applicant's initiative was very categorical and was crucial because in fact it sealed the fate of both his proposal for an agreed termination and his offer of no contest presented on 16 October 1984.

This reaction was negative and is found in two documents. In a cable dated 2 January 1985, the Office of Personnel Services at Headquarters informed the Chief of the Personnel Section of ECLAC that it could no longer support the termination of the Applicant's appointment because it was grounded on his indebtedness. On 8 January 1985, the Applicant was informed in writing that the Secretary-General had decided not to accept the request for an agreed termination of the Applicant's appointment.

VIII. In the view of the Tribunal, it is clear from this categorical rejection that the proposal for an agreed termination made by the Applicant in his memorandum of 16 October 1984, and his offer of no contest, were not met with a corresponding acceptance of the other party. Therefore the Applicant's unilateral offer became legally non-existent. Contrary to the

Respondent's contention, the Applicant did not have to withdraw or cancel an offer which had become extinct by reason of its having been rejected.

IX. The Tribunal finds that the process of agreed termination initiated by the Applicant and rejected by the Respondent had come to an end. If later the Respondent changed his mind and wished to pursue such an agreed termination, he had to start a new process. In that case, the Respondent had to see to it that all the conditions under the last paragraph of staff regulation 9.1(a) were fulfilled.

X. The Tribunal notes that the Respondent seems to have embarked on a process of his own to terminate the permanent appointment of the Applicant.

One year after being notified, on 8 January 1985, of the Respondent's decision not to accept his offer of agreed termination, the Applicant was informed, on 2 January 1986, that the Secretary-General had decided to terminate his appointment in accordance with the last paragraph of staff regulation 9.1(a).

XI. The Tribunal will now examine if that decision met all the requirements stated in the last paragraph of staff regulation 9.1(a).

XII. The Tribunal observes that, three months after the abortion of the process originally initiated by the Applicant for his own specific reason, Mr. Cure, Chief of the Personnel Section of ECLAC, sent on 26 March 1985 a memorandum to the Assistant Secretary-General for Personnel Services which contains three points relating to the process of termination of the Applicant's permanent appointment. The first two points are:

(1) The wish expressed by the Executive Secretary of ECLAC as well as the Division of Administration to terminate the contract of the Applicant in accordance with the last paragraph of staff regulation 9.1(a);

(2) The reasons for such an initiative given by Mr. Cure in addition to the original reason of the Applicant:

(a) There had been a noted decline in the Applicant's performance;

(b) His health had deteriorated;

(c) He had been involved in a disciplinary case going back to 1971;

(d) He had been given a letter of censure for irregularities in submission of medical claims.

The third point in Mr. Cure's memorandum was a recommendation that it would be in the interest of good administration to terminate the permanent appointment of the Applicant.

XIII. In his memorandum of 12 December 1985 addressed to the Secretary-General, the Assistant Secretary-General for Personnel Services, acting upon Mr. Cure's memorandum of 26 March 1985, endorsed the conclusion of Mr. Cure that separation would be in the interest of good administration and recommended approval of the Applicant's termination under the last paragraph of staff regulation 9.1(a). On 27 December 1985, the Under-Secretary-General for Administration and Management agreed to this action on behalf of the Secretary-General and on 2 January 1986 the Applicant was notified accordingly.

XIV. The Tribunal notes that throughout that new process initiated by the Respondent to seek termination of the Applicant's permanent appointment, the Administration relied on the Applicant's offer of 16 October 1984 which the Tribunal has found to have become extinct when it was rejected by the Respondent on 2 January 1985. Therefore the Respondent could not invoke such an offer. When in January 1986 - 14 months after the Applicant's submission of his formal offer to accept an agreed termination - the decision to terminate his appointment was communicated to him, the Applicant immediately exercised his right to contest the decision and asked that the decision be annulled.

XV. Since the contested decision was erroneously based on a no longer existing offer of the Applicant, the Tribunal concludes that the decision is not a proper application of the last paragraph of staff regulation 9.1(a) and should therefore be rescinded.

XVI. The Tribunal considers that reinstatement of the Applicant would not be practicable in the circumstances of the case. The Tribunal has previously held that where the parties cannot be restored to the status quo ante, compensation in lieu of specific performance may be an adequate and proper relief. On the basis of all the evidence in the file, the Tribunal assesses the injury sustained by the Applicant at an amount equal to two years of his net base salary at the time of termination.

XVII. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant two years of his net base salary at the time of termination;

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Arnold KEAN
Member

New York, 23 October 1991

Jean HARDY
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/531
23 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 531

Case No. 561: HALLIN

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Samar Sen;

Whereas, on 20 April 1990, Gunnar Hallin, the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund (the Pension Fund), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 July 1990, the Applicant, after making the necessary corrections, again filed an application containing pleas which read in part as follow:

"PLEAS

(a) Preliminary Measures Requested

It is requested that the Tribunal order the following documents to be produced:

(i) The request likely to have been made by UNDTCD [United Nations Department of Technical Co-operation for Development] in July 1982 in accordance with Section H.3(a) of The Administrative Rules of the United Nations Joint Staff Pension Fund for a determination of incapacity for the purpose of benefits under article 33(a) of the Regulations of the Fund (...). The assumption that such a request was

made is based on the contents of the letter which UNCTCD addressed to the Applicant on 23 July 1982 (...).

(ii) The determination of the Staff Pension Committee in response to the UNDTCD request, if made.

(iii) The Exit Medical Certificate issued by Doctor S.S. Rikhy (medical practitioner on the panel of United Nations Approved Examining Physicians in India), D-105 Defence Colony, New Delhi-110003, India, reporting on the Applicant's state of health and fitness on 10 August 1982.

(iv) The Medical Report issued by the ad hoc United Nations Medical Board which was convened at the Sophiahemmet Hospital in Stockholm on 8 September 1986 for a review of the medical aspects of the Applicant's case, including a thorough physical examination of the degree of his disability.

(v) A statement by the United Nations Medical Director under Rules 204.6(a) and 204.6(b) of the Staff Rules (...) with an assessment of the Applicant's fitness, or lack thereof, at his separation from United Nations service in July 1982 for living, working and travelling under conditions similar to those of all of his five assignments as geophysicist in the service of the United Nations from 1969 to 1982 (...).

(vi) The parts of relevance for this case of the Minutes of the Meetings of

- The United Nations Staff Pension Committee at its 219th meeting on 16 January 1985;

- The United Nations Staff Pension Committee at its 234th meeting on 24 November 1987;

- The Standing Committee of the United Nations Joint Staff Pension Board at its 170th meeting on 20 February 1990.

(b) Decision contested.

The following decision is contested and its rescission is requested under article 9, paragraph 1 of the Statute of the Tribunal:

The decision of the Standing Committee of the United Nations Joint Staff Pension Fund at its 170th meeting

> on 20 February 1990 to uphold the decision of the United Nations Joint Staff Pension Committee at its 219th meeting on 16 January 1985, confirmed upon review at the Committee's 234th meeting on 24 November 1987, and to conclude that the Applicant did not meet the requirements under article 33(a) of the Fund's Regulations and therefore was not entitled to a disability benefit from the Fund (...).
>
> (c) ...
>
> (d) Amount of Compensation Claimed
>
> The Applicant's request for compensation is for a disability benefit under articles 33(a), (b), (c) and (f) of the Regulations of the Fund (...), in lieu of his present deferred retirement benefit, which is based on his contributory service of twelve years, five months and eleven days (...). Under article 33(c) of the Regulations such disability benefit should be payable at the rate of the deferred retirement benefit which would have been payable had the Applicant remained in United Nations service until age 60 and had his final average remuneration remained unchanged, i.e. the period of contributory service should be extended to include the time from his separation from United Nations service on 22 July 1982 until he reached age 60 on 26 December 1987. This additional period comprises five years, five months and sixteen days. Under article 33 the disability benefit should be payable from the day of the Applicant's separation from United Nations service on 22 July 1982.
>
> Under article 33(f) of the Regulations the Board may prescribe the extent to which and the circumstances in which a disability benefit may be reduced when the beneficiary, although remaining incapacitated within the meaning of the article, is nevertheless in paid employment. The question of such a reduction in the present case is discussed in ..."

Whereas, on 27 March 1991, the Respondent filed his answer;

Whereas, on 25 April 1991, the Applicant requested postponement of his case in order to file written observations on the Respondent's answer;

Whereas, on 3 May 1991, the Tribunal granted the Applicant's request for postponement until its next session in October 1991;

Whereas the Applicant filed written observations on 22 July 1991;

Whereas the Applicant submitted an additional written statement on 14 October 1991;

Whereas the facts in the case are as follows:

The Applicant, a former staff member of the United Nations, was a participant in the Pension Fund from 5 August 1969 until 22 July 1982, the period during which he was employed under a series of fixed-term appointments.

On 14 February 1980, the Applicant, a geophysicist by profession, was involved in an automobile accident in India. The accident was subsequently deemed to be service-incurred and the Applicant was compensated under Appendix D to the UN Staff Rules ("Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the United Nations", ST/SGB/Staff Rules/Appendix D/Rev.1 of 1 January 1966). In October 1980, i.e., about eight months after the accident, the Applicant returned to his post in India and continued to perform his functions, in a limited way due to his handicap, on a series of four contracts respectively of one-year's, one-year-and-three-months', five-months' and one-month's duration, until his separation from service on 22 July 1982, upon the expiration of his last appointment. He asserts that had special provision for his physical handicap not been arranged, he would have been unable to resume his duties at all and that "medical clearance would not have been granted, had [he] finally applied following [his] separation in July 1982". Before the expiration of his last contract, he was informed that there were no posts available for him at that time.

By a letter dated 8 March 1984 to the Secretary of the Pension Fund, the Applicant requested that he be considered for the award of a disability benefit from the Pension Fund, but he was informed that the UN Medical Director had indicated that he would not be able to recommend a disability benefit. The Applicant then submitted additional supporting documentation on 12 August 1984. On 16 January 1985, the UN Staff Pension Committee decided unanimously that the Applicant was not entitled to a disability benefit from the Pension Fund as, on the date of his separation from UN service on 22 July 1982, he had not been incapacitated for further service within the meaning of article 33(a) of the Fund Regulations. On 28 January 1985, the Secretary of the UN Staff Pension Committee informed the Applicant of the Committee's decision.

By a letter dated 1 July 1985, the Applicant requested the UN Staff Pension Committee to review its decision of 16 January 1985. At the Applicant's request a medical board was established pursuant to Administrative rule K.7 of the Pension Fund. The Board was composed of Dr. Ulf Nilsonne of Stockholm, Sweden, selected by the Applicant, Dr. Michael Irwin, the UN Medical Director, and Dr. Ben Veraart, selected in agreement by the other two.

The Medical Board met in Stockholm, Sweden, on 8 September 1986. Its conclusions read as follows:

> "From the 17 December 1982 report by Dr. Fellander (who examined Mr. Hallin on 14 December 1982), the Board noted that, based upon the measurements given, Mr. Hallin had, at that time, a partial disability due to a 25% impairment of his right leg (or 10% of the whole person) and a 20% impairment of his right arm (or 12% of the whole person) - using the 2nd edition [issued in '84] of the AMA [American Medical Association] Guides to the Evaluation of Permanent Impairment for these calculations.
>
> On 8 September [1986], the Board agreed that Mr. Hallin had the following impairments (...)
>
> ...
>
> ... a 54% impairment of the right leg (or 22% of the whole person).
>
> ...
>
> ... [and] a 20% impairment of the right arm (or 12% of the whole person)."

On 24 November 1987, the UN Staff Pension Committee unanimously confirmed its earlier decision denying the Applicant's request for a disability benefit. By a letter dated 8 December 1987, the Secretary of the Committee informed the Applicant of the Committee's decision. Without renouncing his claim for a disability benefit under article 33 of the Fund Regulations, the Applicant elected a deferred retirement benefit under article 30 of the Fund Regulations, the payment of which commenced effective 27 December 1987, the day following the Applicant's 60th birthday.

By a letter dated 22 August 1989, the Applicant lodged an appeal to the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) against the decision of the UN Staff Pension Committee. On 4 October 1989, the Secretary of UNJSPB asked the Applicant why he had delayed filing his appeal and informed him of his right to request that a new medical board be established to assist the Standing Committee in its consideration of the case. After an exchange of letters with the Secretary, the Applicant, in a letter of 16 January 1990, decided against requesting the establishment of a new medical board.

On 20 February 1990, at its 170th meeting, the Standing Committee of UNJSPB considered the Applicant's appeal against the decision of the UN Staff Pension Committee. At this meeting, the Standing Committee considered, in addition to the documentation of the case, an assessment made on 7 February 1990 by the Medical Consultant to UNJSPB, Dr. Ingrid Laux, based on the available medical evidence and the documentation advanced by the Applicant in support of his appeal, which assessment reads as follows:

> "... I have reviewed again the medical documentation on Mr. Hallin regarding his possible entitlement to a disability benefit.
>
> According to my opinion, Mr. Hallin was not disabled according to article 33(a) at the time of his separation from the Organization on 22 July 1982, and is therefore not entitled to a disability benefit."

The Standing Committee unanimously decided to uphold, on the merits, the decision of the UN Staff Pension Committee contested by the Applicant. On 7 March 1990, the Secretary of UNJSPB informed the Applicant of the Standing Committee's decision.

On 27 July 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant was incapacitated on the date of his separation from service within the meaning of article 33 of the Regulations of the Pension Fund and was thus entitled to a disability benefit, rather than a deferred retirement benefit.

Whereas the Respondent's principal contentions are:

1. The Applicant was not "incapacitated for further service" on his date of separation.

2. The Applicant was accorded due process.

The Tribunal, having deliberated from 13 to 27 May 1991 in Geneva and on 22 and 23 October 1991 in New York, now pronounces the following judgement:

I. The application in this case challenges a decision of the Standing Committee of the United Nations Joint Staff Pension Board upholding a denial by the United Nations Staff Pension Committee of the Applicant's request for award of a disability benefit. The Tribunal has examined whether the challenged decision represented non-observance of the Regulations and Rules of the Pension Fund.

II. The central question is whether, at the time the Applicant was separated from UN service on 22 July 1982, he was "incapacitated for further service in a member organization reasonably compatible with his abilities" as provided in article 33(a) of the Fund Regulations. A Medical Board was convened to assist the UN Staff Pension Committee in considering the medical aspects of the case. That Board concluded that, on 8 September 1986, the Applicant was, as a result of a 1980 service-incurred injury, disabled to the extent of 22% of the whole person due to a right ankle injury, and 12% of the whole person because of right elbow injury. The Board's report also indicated pain and impairment associated with movement of the Applicant's right hip. No view was expressed in the report on the Applicant's condition at the time of his separation from service in July 1982. Nonetheless, the Board members noted that subsequent to the Applicant's separation, his employment had been sedentary in nature.

III. After the Applicant's accident, he evidently recovered from his injuries sufficiently to enable him to resume his prior employment with the United Nations and to perform the functions required of him satisfactorily.

He asserts that this was possible only because, despite partial disability due to his 1980 injury, the nature of his duties was changed in a way that made them less arduous and less demanding physically than the full range of duties expected of a field engineer. He received four extensions of his contract: one for a year, one for three months, one for almost five months and another for one month. After he separated, he was reported as having been found by the UN Medical Director to be medically eligible for re-employment by the United Nations.

IV. The Applicant's separation from UN service resulted from the expiration of his fixed-term contract. In addition, the Organization had at that time no other vacant position for him to fill.

V. The Applicant does not raise any question about the reason for his separation or the unavailability at that time of a position reasonably compatible with his abilities. His contention rests on the assumption that article 33(a) benefits should be provided to him because he is now, and has for some time since his separation been, physically unable to do the field work he used to do as an exploration geophysicist. His physical inability, he states, was the result of his service-incurred injury in 1980. In the view of the Tribunal, the benefits under article 33(a) are payable only when it is established that, at the time of separation, the participant in the Fund was "incapacitated for further service ... reasonably compatible with his abilities". It was not established in this case that the Applicant had at the time of his separation become thus incapacitated.

VI. The Tribunal has considered the Applicant's request, in his pleas dealing with "preliminary measures", for the production of certain documents. The documents requested in subsections (iii) and (iv) of those pleas have been furnished. In the circumstances, the Tribunal does not consider that the remaining documents, to the extent that they may exist and have not already been furnished, need be produced.

VII. For the foregoing reasons, the application is rejected.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Samar SEN
Member

New York, 23 October 1991

Jean Hardy
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/532
24 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 532

Case No. 485: KIOKO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 14 November 1988, John Kioko, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application in which he contested a decision dated 15 May 1984 by the Executive Director of UNEP to terminate his permanent appointment;

Whereas, by Judgement No. 456 rendered on 2 November 1989, the Tribunal decided:

> "(1) that the decision by the Executive Director, communicated to the Applicant by the Assistant Executive Director for Fund and Administration on 15 May 1984, is hereby rescinded;
>
> (2) that the amount of compensation to be paid to the Applicant, in accordance with article 9.1 of the Statute of the Tribunal, should the Secretary-General decide, within 30 days from the date of the notification of this judgement, that the Applicant shall be compensated, without further action being taken in his case, shall be 18 months net base salary at the rate in effect at the Applicant's separation from service;
>
> (3) if the Applicant has received the amount corresponding to six months net base salary, in accordance with the

decision by the Secretary-General on 30 October 1987, that amount shall be credited against the 18 months salary set forth above;

(4) all other pleas are rejected" (para. XVI).

Whereas Judgement No. 456 was sent to the Secretary-General, through the Legal Counsel, on 17 November 1989 and was received by the Office of Legal Affairs on 21 November 1989;

Whereas, on 15 December 1989, the Office of Legal Affairs transmitted the Judgement to the Department of Administration and Management with a request that the necessary action be taken promptly and with comments on two issues raised in the Judgement, namely, the power of the Executive Director of UNEP to terminate a permanent appointment for unsatisfactory service and the competence of an Appointment and Promotion Board under staff rule 104.14(f)(ii)(B);

Whereas, on 29 December 1989, UNEP cabled the Department of Administration and Management that the Applicant, having been informed of the judgement rendered in his case, was "urgently pursuing settlement";

Whereas, by a cable dated 4 January 1990, the Officer-in-Charge of the Department of Administration and Management informed the Acting Assistant Executive Director of UNEP of the Judgement and advised him that "IN THE CIRCUMSTANCES AND ON THE ASSUMPTION THAT UNEP WOULD NOT WISH TO REINSTATE MR. KIOKO, YOU ARE HEREBY AUTHORIZED TO EFFECT PAYMENT TO MR. KIOKO IN AN AMOUNT EQUIVALENT TO EIGHTEEN MONTHS NET BASE SALARY, MINUS THE SIX MONTHS NET BASE SALARY WHICH WE BELIEVE YOU HAVE ALREADY PAID, AT THE RATE IN EFFECT AT THE APPLICANT'S SEPARATION FROM SERVICE. PLEASE EFFECT THE PAYMENT AND ADVISE ME BY CABLE WHEN THE PAYMENT HAS ACTUALLY BEEN MADE AND THE AMOUNT THEREOF";

Whereas, on 17 January 1990, the Applicant informed the Executive Secretary of the Tribunal that, since 3 December 1989, he had "been waiting for [his] reinstatement", and whereas, on 22 January 1990, the Applicant requested the Executive Director of UNEP to reinstate him;

Whereas, by a letter dated 23 January 1990, the Acting Assistant Executive Director of UNEP informed the Applicant that the Executive Director had confirmed that he did not elect to reinstate the Applicant;

Whereas, on 25 January 1990, UNEP informed the Department of Administration and Management that a cheque had been prepared for payment but that the Applicant wished to consult with counsel before accepting that payment;

Whereas, on 5 March 1990, the Acting Assistant Executive Director of UNEP wrote to the Applicant as follows:

> "Further to my letter dated 23 January 1990 enclosed herewith is cheque No. 035371 dated 6 March 1990 in full and final settlement of the compensation due to you as contained in the United Nations Administrative Tribunal Judgement number 456. ...
>
> You are requested to sign the attached copy of this letter acknowledging receipt of the sum paid."

Whereas, on 12 March 1990, the Applicant acknowledged receipt of the sum paid;

Whereas, on 22 October 1990, the Applicant filed an application containing the following pleas:

"II. PLEAS

10. With regard to its competence and to procedure, Applicant respectfully requests the Tribunal: to find that it is competent to hear and to pass judgement upon the present application under article 2 of its Statute.

11. On the merits, Applicant requests the Tribunal to find: that the Administration has not implemented Judgement 456 of the Tribunal in accordance with the conditions stated in paragraph XVI thereof; neither has the Administration restored the contractual status of Appellant nor has the Administration decided, within 30 days from the date of the notification of the judgement, to compensate the Appellant.

12. Applicant respectfully requests the Tribunal to order the Administration to implement the decision of the Tribunal immediately, and to compensate Appellant for the time that the Administration has not allowed Appellant to perform his duties since 15 May 1984."

Whereas the Respondent filed his answer on 28 November 1990;

Whereas the Applicant filed written observations on 26 December 1990;

Whereas the Applicant's principal contentions are:

1. The decision by the Secretary-General to compensate rather than reinstate the Applicant was not taken within thirty days after notification of the judgement: the period for financial compensation had lapsed and, therefore, the decision to terminate the appointment had been rescinded.

2. The circumstances of acceptance of the cheque did not contribute to a free and good judgement on the side of the Applicant.

Whereas the Respondent's principal contentions are:

1. The decision to compensate the Applicant rather than to reinstate him was timely taken and thus constituted a valid election under article 9.1 of the Tribunal's Statute.

2. In any event, the Applicant has waived any rights to reinstatement by accepting the compensation paid to him in compliance with the judgement.

The Tribunal, having deliberated from 21 to 24 October 1991, now pronounces the following judgement:

I. The application in this case seeks a determination by the Tribunal that the Respondent has failed to implement the Tribunal's Judgement No. 456 dated 2 November 1989. In that Judgement, the Tribunal rescinded a decision terminating the Applicant's service with UNEP and, in accordance with article 9.1 of the Tribunal's Statute, provided for compensation in the event that, in the interest of the United Nations, the Secretary-General decided "within thirty days of the notification of the judgement" that the Applicant would not be reinstated. The Applicant contends that the date of notification of the Judgement was 17 November 1989, but that no decision to

pay compensation to him under the Judgement was taken within the specified 30-day period. Hence it follows, according to the Applicant, that the Judgement now requires that he be reinstated to his post in UNEP as of 15 May 1984.

II. In fact, Judgement No. 456 was transmitted on 17 November 1989 by the Executive Secretary of the Tribunal to the Secretary-General, through his representative, the Legal Counsel, and was received by the Office of Legal Affairs on 21 November 1989; thus the prescribed 30-day period would expire on 21 December 1989. This procedure of notification of Tribunal judgements through the Legal Counsel, who acts for the Secretary-General in Tribunal proceedings, is in accordance with long-standing practice and is, in the opinion of the Tribunal, entirely reasonable.

III. It is customary and reasonable for the Office of Legal Affairs to analyze the Tribunal's judgements and to render legal advice with regard to them when they are transmitted to the Secretary-General. As appropriate, the Office of Legal Affairs draws to the Secretary-General's attention matters arising from Tribunal judgements that may call for further consideration and action on the part of the Secretary-General in addition to steps for implementation of judgements. In Judgement No. 456, paragraph IX, the Tribunal invited the attention of the Secretary-General to a few such matters that might warrant consideration and further action. The Office of Legal Affairs considered these matters and communicated its analysis and views to the Under-Secretary-General for Administration and Management (the Secretary-General's delegee in personnel matters) by a memorandum dated 15 December 1989.

IV. On 4 January 1990, the Officer-in-Charge of the Department of Administration and Management, by cable, informed the Acting Assistant Executive Director of UNEP of Judgement No. 456 and advised him that "... on the assumption that UNEP would not wish to reinstate Mr. Kioko...," UNEP was authorized to make payment in accordance with Judgement No. 456. UNEP received the cable containing this information on 5 January 1990, and regarded it as a decision in the interest of the United Nations to compensate the Applicant rather than to reinstate him. In the Tribunal's

view, in the circumstances of this case that was not an unreasonable reading of the cable. However, because the language of article 9.1 of the Statute speaks of such decisions by the Secretary-General being "in the interest of the United Nations", the Tribunal considers it of importance for the Secretary-General to take that principle into account in arriving at such decisions and to make clear that he has done so by appropriate words instead of relying on implication. The Tribunal considers also that a formal decision so stating should be made by the Secretary-General or his delegee within the 30-day period and communicated immediately to the Applicant.

V. The Tribunal notes that it would have been most extraordinary for the Applicant to have concluded from the language of the cable, which was shown and given to him on 7 January 1990, that no decision had been taken by the Secretary-General, or that, given the views previously expressed about his performance by the UNEP officials who terminated him, there was realistically any open question of reinstating him with almost six years of back pay rather than paying him the amount specified in paragraphs XVI(2) and (3) of Judgement No. 456. Accordingly, the Tribunal considers that in this case a decision of the Secretary-General to compensate rather than reinstate was taken on 4 January 1990, and that the Applicant was made aware of it on 7 January 1990.

VI. The Tribunal considers that the date of notification of its judgements by the Executive Secretary to the Secretary-General is necessarily the date that the judgement is received by the Secretary-General's designated representative - in this case, the Office of Legal Affairs - for the purposes of the 30-day period provided in article 9.1 of the Statute of the Tribunal.

VII. The Tribunal notes that article 9.1 of the Statute applies the principle according to which a judgement of the Tribunal must be executed by all concerned. An order by the Tribunal rescinding a contested decision constitutes the basic content of its judgement. Damages awarded by the Tribunal under article 9.1 are of a subsidiary character in the sense that they are granted in lieu of specific performance. If there should be a

deviation from the framework of article 9.1 by the Secretary-General, as here, it is for the Tribunal to determine the consequences and the effect of its judgement.

VIII. The Tribunal turns to the question of what are the consequences in this case of the Secretary-General's delayed decision with respect to payment rather than reinstatement. In determining the effect of any judgement rendered by it, the Tribunal considers that the circumstances of each case must be examined. Here the delay was relatively short. It is quite clear from the background of the case and from what occurred after the notification of the Judgement that the Respondent had and still has no wish to reinstate the Applicant. The relatively short delay did not involve either bad faith or arbitrary conduct, and was explained on reasonable grounds. Accordingly, the Tribunal considers that it would be inappropriate here to conclude that the consequence was automatically reinstatement. Nevertheless, what occurred constituted an irregularity for which the responsibility of the Administration is engaged. The Tribunal finds that an award of additional compensation in the amount of three months' net base salary would be adequate for the injury sustained and should be made.

IX. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant three months of his net base salary at the rate in effect at the time of his separation from service.

2. Rejects all other pleas.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 24 October 1991

Jean HARDY
Acting Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/533
28 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 533

Case No. 567: ARAIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Arnold Kean;

Whereas, on 18 October 1990, Amer Salih Araim, a staff member of the United Nations, filed an application containing the following pleas:

"II Pleas

The Applicant respectfully requests the Tribunal:

1. To find that the Administration failed to advertise the post of Chief of Committee Services and Research Branch, as required by resolution 33/143 part 1, paragraph 1(a) of 20 December 1978 and therefore violated his right to be considered for that post.

2. To find the Administration has failed to observe staff regulation 4.4 by not giving consideration to the candidacy of the Applicant for the vacant post and resorting instead to outside recruitment.

3. To find that the decision to exclude the Applicant from consideration because of his nationality violates article 101, paragraph 3 of the Charter, as well as this Tribunal's decision in Judgement No. 312 (Estabial).

4. To endorse and reaffirm the unanimous conclusions reached by the JAB [Joint Appeals Board] panel which stated that:

'the decision to fill the post (of Chief of Committee Services and Research Branch in the Centre against Apartheid) through replacement was flawed since it did not meet the conditions laid down for filling the post in this manner;

the appellant, as a staff member, had a statutory right to due consideration for the vacant post and that this right was violated.'

5. To request the Secretary-General to rescind the decision to fill the post of Chief of Committee Services and Research Branch in the Centre against Apartheid by outside recruitment.

6. To provide the Applicant with the opportunity to apply for this post and to ensure that serious consideration be given to the Applicant's candidacy for promotion to the D-1 level to the contested post or any other D-1 post within the Secretariat under staff rule 104.14.

7. To award Applicant, in any case, compensation equal to two years base salary for injury sustained by him as a result of the pre-determination to exclude his candidacy for the post and the resulting degrading treatment that was inflicted on him, as well as the delay in responding to his correspondence."

Whereas the Respondent filed his answer on 31 May 1991;

Whereas the Applicant filed written observations on 27 June 1991;

Whereas the Applicant submitted additional documents on 3 July, 29 August, 25 September and 18 October 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978 on secondment from the Government of Iraq, on a fixed-term appointment for three years as a Political Affairs Officer at the P-4 level in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs. On 1 June 1981 he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same Department. On 8 August 1981 the appointment of the Applicant, who had resigned from the service of his government, was extended for three years. On 1 April 1982

the Applicant was promoted to the P-5 level as Senior Political Affairs Officer. On 1 May 1984 he received a probationary appointment which was converted to a permanent appointment on 1 January 1985.

On 16 January 1990 the Applicant wrote to the Assistant Secretary-General for Human Resources Management concerning the post of Chief of the Committee Services and Research Branch, a D-1 post then occupied by a Ukrainian who was about to retire; the Applicant, having been informed that this post would be filled by replacement from the same nationality, requested that the post be filled through Vacancy Management and that he be given a chance to apply for it. On 6 February 1990 the Director of the Recruitment and Placement Division sent him the following reply:

> "1. ... To date, the Office of Human Resources Management has not received a request for filling of this post either through the procedures of Vacancy Management nor through external recruitment of a candidate from a country whose candidates primarily serve on fixed-term appointments.
>
> 2. However, you may wish to note that the General Assembly in paragraph 4 of Section I of its resolution 35/210 of 17 December 1980 has requested the Secretary-General 'to continue to permit replacement by candidates of the same nationality within a reasonable time-frame in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected.'
>
> 3. While no discussions have been held regarding the filling of the above post, the Secretary-General reserves the right to fill posts in accordance with the provisions of the above paragraph.
>
> 4. I am sending a copy of this memorandum to Mr. Safronchuk [Under-Secretary-General for Political and Security Council Affairs] and Mr. Mousouris [Assistant Secretary-General, Centre against Apartheid] to confirm your interest in this post."

On 6 March 1990 the Applicant requested the Secretary-General to review the decision to fill the post in question by replacement from the same nationality; he specifically requested that the procedure for

recruitment by replacement for this post be halted, that the post be advertised and that his application for the post be considered. On 22 May 1990, not having received a substantive response to his request, the Applicant, who had been unable to obtain the Secretary-General's agreement to direct submission of an application to the Tribunal, lodged an appeal with the Joint Appeals Board and asked for a stay of administrative action under staff rule 111.2(f).

On 25 May 1990 the Assistant Secretary-General, Centre against Apartheid, sent to the Director of the Recruitment and Placement Division a memorandum reading in part:

> "1. As you know, Mr. Vladimir Bruz shall be retiring from his post as Chief of the Committee Services and Research Branch by the end of this month.
>
> 2. In looking for the most appropriate replacement for Mr. Bruz, I have given very careful consideration to all the potential candidates within the Center (special attention was paid to Mr. Araim who is the senior P-5 officer in the Centre, and who has expressed his interest in the post). The need for experience in supervision of research and the requirement for geographical balance in the composition of the senior staff of the Centre also played an important part in my consideration.
>
> 3. Finally, you will be aware of the ongoing developments in South Africa which necessitate that the Centre be in a position to act with speed and flexibility in facing rapidly changing circumstances. That flexibility may also have to include the structure of the Centre. Consequently, I feel that, at this stage, it is desirable to fill this vacancy with a candidate on a fixed-term contract.
>
> 4. Taking all of the above into consideration, as well as the need for filling this vacancy expeditiously, I have recently interviewed four Ukrainian candidates (...) who seemed to fill the necessary requirements.
>
> 5. I have concluded that Mr. Igor Khvorostiany will best be able to serve the needs of the Centre and I would be grateful if you would ensure the earliest retention of his services on this D-1 post for a 2-year fixed-term appointment.
>
> 6. Mr. Khvorostiany is presently the Deputy Director of the Institute of History, Academy of Sciences of the Ukrainian SSR. His functions involve research in contemporary international relations, and administrative supervision of 70 research fellows. ...".

On 29 May 1990 the Assistant Secretary-General, Centre against Apartheid, explained his decision to the Applicant in the following memorandum:

> "Through verbal communications from you, and from copies forwarded to me by OHRM [Office of Human Resources Management] of correspondence between yourself and the Secretary-General, and Mr. Annan [Assistant Secretary-General for Human Resources Management], I have become aware of your interest in the soon-to-be vacant post of Chief, Committee Services and Research Branch.
>
> I am writing to you in order to assure you that I have given serious and full consideration to all potential and eligible candidates within the Centre. Knowing of your interest in this post, and taking due account of your seniority and experience within the Centre, I have paid particular attention to your possible candidature.
>
> Based on my analysis of the future needs of the Centre, and in view of all the circumstances, including the need to retain flexibility in staffing in light of the changing constraints under which the Centre has to operate, as well as the need to maintain a geographic balance in the composition of the senior staff of the Centre, I have decided that the post should be filled on a fixed-term basis and, accordingly, have extended the search for an appropriate candidate outside the Centre. It is therefore my conclusion that the interests of the Centre are best served at this time by your continuing in your present functions.
>
> In closing, I should like to stress the fact that my decision to look elsewhere than the Centre for candidates for this post is not a reflection on your performance in your present post, but a reflection of my desire to fill the vacancy in the most appropriate manner, taking into account all the requirements of the post at this particular time."

On 1 June 1990 the Assistant Secretary-General, Centre against Apartheid, appointed a staff member at the D-1 level in his Office as Acting Chief of the Committee Services and Research Branch. The Applicant protested against that decision on the grounds that he was the senior P-5 staff member in the Branch and that in the past two years he had been appointed Acting Chief of the Branch in the absence of the Chief.

On 4 June 1990 the Joint Appeals Board recommended that action on the contested decision be suspended in accordance with staff rule 111.2(f). This recommendation was accepted by the Secretary-General on 18 June 1990. On 3 July 1990 the Joint Appeals Board submitted its report on the merits of the appeal. The Board's conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 38. The Panel concludes that:
>
> - the decision to fill the post through replacement was flawed, since it did not meet the conditions laid down for filling a post in this manner;
>
> - the appellant, as a staff member, had a statutory right to due consideration for the vacant post and that this right was violated; and,
>
> - the appellant also failed to prove damage suffered as a result of the delay by the Administration in responding to his letters.
>
> 39. Accordingly, the Panel recommends that the contested post be filled through vacancy management and that the appellant be considered fully and fairly along with other candidates."

On 23 July 1990 the Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

> "...
>
> The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision and to take no further action on the matter. The Secretary-General's decision is based on the recognized policy and practice of the Organization that certain posts are expressly excluded from the Vacancy Management and Staff Redeployment procedure, namely posts subject to geographical distribution needed to 'permit replacement by candidates of the same nationality within a reasonable time-frame in respect of the posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected' in accordance with General Assembly

resolution 35/210 (I) of 17 December 1980, reaffirmed in subsequent resolutions, and as provided for in Administrative Instruction ST/AI/338/Add.5, paragraph 32(h).

In reviewing your case the Secretary-General noted that the Ukrainian Soviet Socialist Republic had 26 staff members on board against a desirable range of 22 to 32, with one national at the D-1 level. The Secretary-General thus decided that it was necessary to confirm the decision to replace Mr. Vladimir Bruz with a staff member of the same nationality in accordance with the provisions of ST/AI/338/Add.5, paragraph 32(h).

The Secretary-General noted that your terms of appointment do not confer on you any right to promotion nor to any particular post or office and that decisions on promotion cannot be challenged on the ground of inadequate consideration or performance or length of service or any similar ground as consistently held by the Administrative Tribunal. The Secretary-General further noted that you were duly considered for the post in question and that the grounds for the contested decision were reasonable.

..."

On 18 October 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration has failed to advertise the post of Chief of the Committee Services and Research Branch as required by General Assembly resolution 33/143, part I, paragraph 1(a). The Administration referred to Administrative Instruction ST/AI/338/Add.5 as an excuse for not issuing a vacancy announcement, but none of the reasons advanced by the Administration was prescribed in Administrative Instruction ST/AI/338/Add.5 or in General Assembly resolution 35/210, which was not even referred to by the Administration.

2. The principle of equitable geographic distribution cannot take precedence over the requirements of promoting staff members on the basis of the highest standards of efficiency, competence and integrity.

3. The refusal of the Joint Appeals Board to award compensation to the Applicant for the serious flaw caused by the Administration's decision

to exclude him from applying for the contested post constitutes an error of law since the Board had found that there had been violations of the Applicant's rights.

4. The Respondent failed to observe staff regulation 4.4 in spite of the fact that the Applicant met all the requirements to be promoted to the post.

5. The factors advanced by the Respondent to justify his decision - the need to retain flexibility in staffing and the need to maintain a geographic balance in the composition of the senior staff of the Centre - were not prescribed by General Assembly resolution 35/210 or Administrative Instruction ST/AI/338/Add.5 as a basis for filling the post through replacement.

Whereas the Respondent's principal contentions are:

1. In making the appointment, the Respondent did not contravene any Staff Regulation, and acted in accordance with General Assembly resolution 35/210 and applicable Instructions. When the Respondent makes an appointment in compliance with General Assembly resolution 35/210 in a case to which that resolution applies, the Respondent does not contravene staff regulation 4.4, or violate the rights of any candidate for the post to which that resolution applies.

2. The Secretary-General is bound to implement the replacement procedure established in resolution 35/210 and continuously reaffirmed in later resolutions. Resolution 35/210 was expressly implemented by the Secretary-General as part of the Vacancy Management's System, pursuant to which the Applicant sought consideration for promotion. Compliance with that resolution, based on the Charter, cannot violate any rights of the Applicant.

3. Notwithstanding the existence of the replacement procedure, the contemporaneous record shows that the Applicant was considered seriously and fairly for the post.

4. The lack of advertisement does not vitiate the solution process if the staff member has been given adequate consideration. The Applicant was aware of the impending vacancy and in fact presented his candidacy.

The Tribunal, having deliberated from 22 to 28 October 1991, now pronounces the following judgement:

I. The Applicant served the United Nations from 1978, receiving a permanent appointment on 1 January 1985. On 1 April 1982 he was promoted to the P-5 level as Senior Political Affairs Officer in the Committee Services and Research Branch in the Centre against Apartheid.

II. On 16 January 1990 the Applicant wrote to the Assistant Secretary-General for Human Resources Management concerning the post of Chief of the Committee Services and Research Branch, a D-1 post then occupied by a Ukrainian who was about to retire. The Applicant, having been informed that the vacant post would be filled by replacement, that is to say by a Ukrainian, requested that the post be filled through Vacancy Management and that he be given a chance to apply for it. On 6 February 1990 the Director of the Recruitment and Placement Division replied that, while no discussions had yet been held regarding the filling of this post, the Secretary-General reserved the right to fill posts in accordance with section I of General Assembly resolution 35/210 of 17 December 1980, that is to say by replacement by candidates of the same nationality as the previous incumbents in respect of posts held by staff members on fixed-term contracts, whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed-term contracts is not adversely affected.

III. In due course the Assistant Secretary-General, Centre against Apartheid, travelled to Kiev and interviewed four Ukrainian candidates, one of whom was selected to fill the post.

IV. The Tribunal notes that the replacement procedure could, under resolution 35/210, be applied "whenever this is necessary to ensure that the representation of Member States whose nationals serve primarily on fixed term contracts is not adversely affected". Mr. Bruz, who was due to retire from the post in question, was a Ukrainian employed on a fixed-term contract.

He was one of 27 Ukrainians then employed, a number well within the agreed range of 22-32, so that his replacement by a non-Ukrainian would not have resulted in a great change in the representation of that State. The Tribunal, however, regards this point, and with it the question whether there would be an adverse effect on the representation of Ukraine, as being within the discretion of the Secretary-General in the absence of an error of fact or of law, arbitrariness, prejudice or other extraneous factors.

V. The Applicant having requested that the filling of the post by replacement should be reconsidered, the Assistant Secretary-General, Centre against Apartheid, wrote a memorandum to the Director of the Recruitment and Placement Division on 25 May 1990, in which he stated that he had interviewed four Ukrainian candidates who seemed to meet the requirements of the post and had concluded that Mr. Khvorostiany would best be able to serve the needs of the Centre. On 29 May 1990, the Assistant Secretary-General, Centre against Apartheid, wrote to the Applicant a memorandum in which he explained his decision, stating that he had given "serious and full consideration" to all eligible candidates within the Centre and had paid particular attention to the Applicant's possible candidature. He stated that he had decided that the post should be filled on a fixed-term basis,

> "in view of ... the need to retain flexibility in staffing in light of the changing constraints under which the Centre has to operate [and] the need to maintain a geographic balance in the composition of the senior staff of the Centre".

The Tribunal notes that neither of the reasons given by the Assistant Secretary-General in his memorandum of 29 May 1990 cites resolution 35/210.

VI. The Tribunal observes that the Applicant's claim falls squarely within the jurisprudence established in its recent Judgement No. 492, Dauchy (1990). As in that case, the Tribunal does not doubt that, if the Respondent reasonably considered it necessary to employ the replacement

procedure in order to avoid the adverse effect described in resolution 35/210, he was justified in designating a Ukrainian to fill the D-1 post in question, though he was not obliged to do so.

VII. At the same time, however, the Respondent was obliged to comply with "the paramount consideration in the employment of the staff", set forth in Article 101 of the United Nations Charter, that is to say "the necessity of securing the highest standards of efficiency, competence and integrity". In the circumstances of the present case, the Respondent was obliged to ensure compliance with the "paramount consideration" by giving fair and full consideration to any eligible candidate who aspired to the vacant post and was reasonably capable of fulfilling its needs.

VIII. The Assistant Secretary-General, Centre against Apartheid, in his memorandum of 29 May 1990 assured the Applicant that he had given "serious and full consideration" to all potential and eligible candidates within the Centre. The Tribunal sees no reason to doubt the truth of this statement, but it must take into account the fact that consideration was necessarily given against the background of resolution 35/210. It is apparent to the Tribunal that only if no satisfactory Ukrainian candidate had been found could the Applicant have been selected. Otherwise, very serious and full consideration of the Applicant in all good faith could not have had any effect. It could not, in the words used by the Tribunal in Judgement No. 492, have led anywhere.

IX. It is by no means certain that the Applicant would have been successful if the post had been filled by Vacancy Management, but his chance of success was necessarily precluded once the Respondent had decided to fill the post by replacement. He should receive compensation for the injury he has suffered. In addition, the Tribunal trusts that the Applicant will receive the full and fair consideration to which he is entitled for any vacant D-1 post for which he may be qualified.

X. The Tribunal decides that the Applicant should receive compensation for the injury he has suffered in the amount of $5,000.

XI. For the foregoing reasons, the Tribunal:

1. Awards compensation to the Applicant in the amount of $5,000;
2. Rejects all other pleas.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Arnold KEAN
Member

New York, 28 October 1991

Jean Hardy
Acting Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/534
29 October 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 534

Cases No. 502: ROSSMAN
No. 503: SABBARESE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Ioan Voicu;

Whereas at the request of Roslyn Rossman, a former staff member of the United Nations, and of Rita Sabbarese, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1988 and 30 November 1988 the time-limit for the filing of applications to the Tribunal;

Whereas, on 30 November 1988, the Applicants filed applications which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicants, after making the necessary corrections, again filed the applications on 27 February 1989;

Whereas the applications contained the following pleas:

"II. Pleas

The Administrative Tribunal is respectfully requested to rule that:

the 1979 promotion review from G-5 to the professional category should have been held;

Applicant[s] had the right to be reviewed at that time;

> corrective action is required, at this time, in the form of submission by the Secretary-General of the two cases to the appropriate promotion body."

Whereas the Respondent filed his answers on 9 March 1989;

Whereas the Applicants filed written observations on 9 June 1989;

Whereas Ms. Sabbarese submitted additional statements and additional documents on 5 January and 17 October 1991;

Whereas Ms. Rossman submitted an additional statement on 6 January 1991;

Whereas the facts in the two cases are as follows:

Ms. Rossman received a permanent appointment with the United Nations as a Secretary at the G-3 level on 17 May 1954. She was promoted to the G-4 level on 1 January 1958 and became an Administrative Clerk on 17 October 1961. She was promoted to the G-5 level as an Administrative Assistant on 1 January 1968 and retired on 31 August 1985.

Ms. Sabbarese received a permanent appointment with the United Nations as a Clerk at the G-3 level on 1 September 1967. She was promoted to the G-4 level as a Senior Coding Clerk on 1 July 1969 and to the G-5 level as a Principal Codifier on 1 April 1975. She became a Principal Finance Clerk on 15 December 1975 and an Administrative Assistant on 16 October 1978.

In their performance reports, both Applicants received the highest or the second highest over-all rating.

On 20 December 1978, at its thirty-third session, the General Assembly adopted resolution 33/143 and requested the Secretary-General, in Part I, paragraph (g), to adopt measures to ensure that

> "Movement of staff from the General Service category to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for

> appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years' experience and post-secondary educational qualification."

In order to implement General Assembly resolution 33/143, on 29 August 1979 the Secretary-General established in Bulletin ST/SGB/173 a new system for promotion of staff members from the General Service to the Professional category that involved a competitive examination. On the same date, the Assistant Secretary-General for Personnel Services issued Administrative Instruction ST/AI/268 in which he set forth the procedures that would govern the new system. Later, on 10 March 1981, as a result of Administrative Tribunal Judgement No. 266, Capio against the Secretary-General of the United Nations, the Assistant Secretary-General for Personnel Services issued Information Circular ST/IC/81/19 on "Review of General Service staff members recommended for promotion to the Professional category for the 1979 Register". The circular provided that staff members in the General Service category who had been assigned the functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268 of 29 August 1979 were entitled to be considered for promotion from the General Service category to the Professional category without a competitive examination.

On 14 August 1981 the Applicants, on their own behalf and on behalf of the other G-5 staff members at New York who, "having the required seniority in the grade on 1 January 1979", were "entitled to be reviewed for promotion to the P-2 level", wrote to the Secretary-General to express their deep concern that, in his efforts to implement General Assembly resolution 33/143, they had "been denied rights established by the Charter, as well as those acquired under the Staff Rules and the practices of the United Nations regarding promotion". They proposed that the Secretary-General, in the exercise of his discretion to select

appropriate competitive methods for promotion, consider several measures to complement the steps already taken to implement the resolution of the General Assembly. These proposals included the establishment of a special promotion review for all G-5 staff who on 1 January 1979 had the required seniority to be reviewed under the old system, regardless of whether they had ever been recommended for promotion. In a letter dated 19 October 1981, the Assistant Secretary-General for Personnel Services replied that the request for a special promotion review procedure could not be favourably considered, particularly since, in its resolution 35/210 of 17 December 1980, the General Assembly had reiterated its earlier recommendation and strengthened it by stating that movement of staff from the General Service category to the Professional category was to be regulated exclusively through competitive examination under the conditions outlined in the earlier resolution and that no exceptions were to be authorized.

On 11 January 1982 the Applicants requested to be permitted to waive proceedings before the Joint Appeals Board and to present directly to the Tribunal their claim that they were denied their acquired rights on the basis of an incorrect interpretation of the judgement rendered by the Tribunal in the Capio case. Their request was subsequently denied on the ground that resolution of their cases required a factual determination that they had been assigned to or had performed professional functions before the institution of the examination procedure, or had been recommended for promotion before the start of that procedure, and therefore that they did, in fact, fall within the transitional measures.

On 19 and 30 December 1985 respectively, Ms. Rossman and Ms. Sabbarese submitted statements of appeal to the Joint Appeals Board. The Board submitted its report on 4 May 1988. The Board's conclusion and recommendation read as follows:

"Conclusion and recommendation

37. The Panel concluded that neither Ms. Rossman nor Ms. Sabbarese were among the persons identified by circular ST/IC/81/19 and that therefore under the law on acquired rights as laid down by the Administrative Tribunal neither appellant had a right to be considered for promotion to the Professional category under the method prevailing before the introduction of the system of competitive examinations.

38. In view of the above conclusion, the Panel finds itself unable to make a recommendation in favour of the appeal."

On 11 May 1988 the Under-Secretary-General for Administration and Management informed the Applicants that the Secretary-General, having re-examined their cases in the light of the Board's report, had decided to maintain the contested decisions. On 27 February 1989 the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants were denied their right to review for promotion from the General Service to the Professional category in 1979 contrary to the principle of acquired rights.

2. The establishment of a new system for promotion did not provide adequate means of protection of their duly acquired rights.

Whereas the Respondent's principal contentions are:

1. For the reasons stated in the conclusion of the Joint Appeals Board, the rights of the Applicants were not violated.

2. The new procedure did not violate the acquired rights of staff, and the Applicants' situation is clearly distinguishable from that of Capio.

The Tribunal, having deliberated from 15 to 29 October 1991, now pronounces the following judgement:

I. Since the applications filed by the two Applicants are similar, the Tribunal decides that they should be joined and disposed of in a single judgement.

II. The Tribunal finds that there is no dispute between the parties as to the facts of the two cases, which were properly established by the Joint Appeals Board.

III. The first legal question to be decided by the Tribunal is whether the Joint Appeals Board has correctly interpreted Information Circular ST/IC/81/19 of 10 March 1981 in finding that the two Applicants, who had an excellent record of performance, were not among the persons identified by that circular and that therefore under the law on acquired rights as laid down by the Tribunal neither Applicant had a right to be considered for promotion to the Professional category under the method prevailing before the introduction of the system of competitive examinations pursuant to General Assembly resolution 33/143 of 20 December 1978.

IV. The Tribunal notes that the Joint Appeals Board made a detailed analysis of the applicability of Information Circular ST/IC/81/19 in the light of the judgements rendered by the Tribunal, after the introduction of the system of competitive examinations, regarding claims of staff members in the General Service category for promotion to the Professional category without taking a competitive examination. In this respect, the Joint Appeals Board made appropriate references to Judgements No. 266, Capio (1980), No. 295, Sue-Ting-Len (1982), No. 296, Sun (1982), No. 311, Schurz (1983) and No. 342, Gomez (1985).

V. After a thorough consideration of the present cases, the Panel of the Joint Appeals Board reported as follows:

> "31. The Panel considered that it would be going contrary to the above judgements of the Administrative Tribunal if it were to accept the contentions of the appellants that they had an acquired right to be considered for promotion under the pre-1979 system by the mere fact that by the end of 1978, they had the required seniority to be considered for promotion under that system. In the view of the Panel, the judgements of the Tribunal rendered after the issuance of information circular ST/IC/81/19 made clear that, according to the Tribunal, an acquired right to be considered for promotion outside the examination procedure exists only in cases which fall within the terms of that circular. It was true that in the only one of those cases in which the appellant prevailed, that of Sun, the precise terms of this circular were not met. However, in that case, the Tribunal had considered that these terms would have been met but for the fact that an official had not taken an action expected of him for reasons unrelated to the case of the Applicant. Thus, the Panel concluded that the law as laid down by the Tribunal is that acquired rights can be claimed only if the terms of ST/IC/81/19 are met or if the circumstances in an appellant's case are such that he or she clearly belongs to the class which the circular intended to identify though because of some entirely fortuitous circumstances this identification was not completed. The Panel found that neither Ms. Rossman's nor Ms. Sabbarese's case were in that class."

VI. The Tribunal subscribes to this paragraph of the report of the Joint Appeals Board and on the basis of the same considerations finds that the two Applicants are not entitled to the benefits of the information circular mentioned above as it appears that they had not been assigned the functions of a professional post and that their departments had made no recommendations for their promotion prior to the issuance of Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268.

VII. The Tribunal cannot concur with the view expressed by the Applicants that since they had attained the required seniority

and had the desired level of performance their cases should have been duly reviewed by the Appointment and Promotion Board, irrespective of whether there was a departmental recommendation or not.

VIII. In fact, the text of Information Circular ST/IC/81/19 is clear in this regard and concerns the "review of General Service staff members recommended for promotion to the Professional category for the 1979 register" (emphasis added). It relates to staff members in the General Service category "who had been assigned the functions of a Professional post and for whom the department or office concerned had prepared recommendations prior to the issuance of the Secretary-General's Bulletin ST/SGB/173 and Administrative Instruction ST/AI/268 of 29 August 1979" (emphasis added).

IX. As to the contention of one of the Applicants (Ms. Sabbarese) that the principle of "collateral" cannot be denied, the Tribunal refers to its own jurisprudence and, as it did in Judgement No. 342, Gomez (1985), para. VII,

> "... reiterates its rejection, as in Judgement No. 311, paras. VI-VIII (Schurz, 1983), of any theory that 'collaterals' should be regarded as having an acquired right to be considered for promotion when, as a matter of fact, they had not been so recommended by their respective departments."

X. In conclusion, the Tribunal cannot find in the present cases a legal basis for the promotion of the two Applicants to the Professional category and, therefore, cannot order any corrective action to be undertaken by the Respondent.

XI. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Ioan VOICU
Member

New York, 29 October 1991

Jean Hardy
Acting Executive Secretary